

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

CURTIS R. FOOTE,)
)
)
Plaintiff,)
)
)
V.) Case No. CIV-05-511-L
)
)
RON WARD,)
)
)
Defendant.)

O R D E R

Plaintiff, a state prisoner appearing *pro se*, brings this action pursuant to 28 U.S.C. § 2254 seeking a writ of habeas corpus. This matter is before the court for review of the Report and Recommendation entered by United States Magistrate Judge Doyle Argo on January 23, 2006. The Magistrate Judge recommended that respondent's motion to dismiss petitioner's newly-added claim be denied, finding that petitioner is entitled to equitable tolling under the special facts and circumstances presented.

The court file reflects that respondent filed an objection to the Report and Recommendation which the court has carefully considered. Respondent asserts that the Magistrate Judge has reached an erroneous conclusion from the factual circumstances and that equitable tolling should not be applied to excuse petitioner's failure to diligently pursue his rights in failing to timely file his amended petition. The court shares respondent's concerns and agrees that mere

excusable neglect is insufficient to justify equitable tolling. Equitable tolling is only available in rare and exceptional circumstances. Notwithstanding respondent's assertion that the petitioner simply and inexcusably overlooked the filing deadline, the court finds that the other factors considered by the Magistrate Judge weigh in favor of equitable tolling. These other factors include the fact that leave to amend the petition was granted prior to the expiration of the applicable limitations period and that the amended petition attached to the motion to amend was identical to the amended petition that was eventually filed. Upon *de novo* review of the record and for all the reasons given by the Magistrate Judge, the court finds that the Report and Recommendation should be adopted in its entirety.

Accordingly, respondent's motion to dismiss the amended petition **[Doc. No. 19] is denied. Respondent is directed to respond to the merits of the amended petition within twenty (20) days of this order.**

This matter is recommitted to the Magistrate Judge for further proceedings in accordance with the original order of referral.

It is so ordered this 23rd day of March, 2006.


TIM LEONARD
TIM LEONARD
United States District Judge